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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1337

THE HONORABLE LOUIS J. GILIBERTO, JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, ET AL., EITAN ARONOWITCH, ET AL.,

Petitioners,

v.

COMPAGNIE NATIONALE AIR FRANCE and SINGAPORE AIRLINES,

Respondents.

RESPONDENT AIR FRANCE'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Counterstatement

One of the surprising aspects of petitioners' lengthy "brief" in support of the petition for a writ of certiorari is that it extends over seventeen pages before even discussing the alleged legal issues involved. Nine of these seventeen pages are devoted to an extended recitation of the facts of the hijacking of June 27, 1976 and the nature of the treatment accorded to petitioners during their incarceration at Entebbe. While such discussion might have some import if the hijackers or the government of Uganda were before this Court, it has no relevance whatsoever with respect to petitioners' claims against the respondents. The result is that petitioners' brief is impermissibly long, and

in flagrant violation of Rule 23 (1.(c) and (e); Rule 23(4); Rule 40 1.(d)(1), and (f); and Rule 40(5) of the Rules of this Court.

As remarkable as petitioners' "brief" may be for what it does contain, it is even more remarkable for what it does not contain. Nowhere in petitioners' seventy-six pages is there any mention of the fact that actions have been filed against Air France in either Israel, France or Canada on behalf of *all* of the passengers on the hijacked Air France aircraft who are involved in this petition. In each instance, these passengers, who are all non-residents of the United States, have filed suit against Air France in their country of citizenship. All of such actions were filed by petitioners shortly before the running of the two-year prescriptive period set forth in Article 29 of the Warsaw Convention [49 Stat. Part 2—3021]. A complete list of these passengers on Air France flight 139 of June 27, 1976 who have brought suit against Air France in the courts of Canada, France and Israel accompanies this brief as "Appendix A". Accordingly, contrary to the false impression created in the petition, the decision of the Illinois Supreme Court dismissing petitioners' claims has not deprived petitioners of forums in which to litigate their alleged claims against respondent Air France arising out of the hijacking.

Question Presented

Should this Court review a decision of the Supreme Court of Illnois which is in complete accord with United States authority as to the applicability of the Warsaw Convention to claims arising out of aircraft hijackings, as to the interpretation of the permissible forums for suit enumerated in Article 28 of the Convention [49 Stat. Part 2(1)-3020], and as it relates to the Illinois doctrine of *forum non conveniens?*

POINT I

All of petitioners' claims against respondent Air France arising out of the hijacking to Entebbe are exclusively governed by the conditions and limits set forth in the Warsaw Convention.

In Point I of their brief in support of the petition for a writ of certiorari, petitioners allege that respondent Air France argued before the Illinois Supreme Court, and that court subsequently held, that petitioners were and remained "passengers" of Air France at all times, including the seven day period while they were imprisoned in Entebbe, Uganda. This assertion is a complete misstatement not only of Air France's argument before the Illinois Supreme Court, but of the express holding of that court.

The scope of an air carrier's liability for deaths or injuries sustained by passengers in international transportation is set forth in Article 17 of the Warsaw Convention (49 Stat. Part 2—3018):

> *"Article 17*
>
> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injuries suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Petitioners' "passenger" argument is apparently based upon the allegation that many of the injuries and deaths occurred following petitioners' disembarkation from Air France's aircraft at Entebbe. As the clear wording of Article 17 demonstrates, however, the applicability of this Article depends *not* on the location of the plaintiffs' *injuries,* but on the location of the "accident" causing the

injuries. As long as the accident causing the injuries takes place "on board the aircraft or in the course of any of the operations of embarking or disembarking", *all* injuries which flow from the accident are covered by Article 17 *regardless* of the particular location where these injuries occur. In this action, the "accident" constitutes the hijacking of Air France Flight 139, which hijacking obviously occurred while petitioners were on board Air France's aircraft. Accordingly, Article 17 of the Warsaw Convention comprehends all of the petitioners' claims for injuries and damages caused by that "accident". The common law question of whether the passenger/carrier relationship continued to exist after petitioners' disembarkation from Air France's aircraft is, therefore, entirely irrelevant to the determination of whether their claims against Air France are governed by the Warsaw Convention. In discussing petitioners' argument relating to the non-applicability of the Warsaw Convention to petitioners' injuries incurred after disembarkation from Air France's aircraft at Entebbe, the Illinois Supreme Court correctly interpreted the scope of Article 17 of the Warsaw Convention as follows (74 Ill. 2d 90, 383 N.E.2d at 981):

> "From more specific allegations made later in the complaint it appears that some, at least, of the threats and physical injuries to which the plaintiffs were allegedly subjected may not have taken place while they were aboard the plane but rather while they were kept in detention at Entebbe. Assuming that to be the case the Warsaw Convention would not thereby be rendered inapplicable to this suit. Its applicability, under Article 17, depends upon the place where the 'accident,' rather than the resulting injuries, occurred, and the 'accident,' as already noted, consisted of the hijacking itself."

In support of its holding relating to the applicability of the Warsaw Convention to the claims arising out of

the hijacking to Uganda, the Illinois Supreme Court cited a number of recent federal court decisions which have held the Warsaw Convention applicable to claims arising out of aircraft hijackings and other intentional acts of terrorism committed in the course of international flights, including *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973); and *Karfunkel* v. *Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D.N.Y. 1977). 74 Ill. 2d 90, 383 N.E. 2d at 980.

In an attempt to discredit the Illinois Supreme Court's reliance on the above-cited cases, petitioners claim that the facts in this case are "materially different from the facts in any of the decisions cited by the Illinois Supreme Court." This assertion is negated by the fact that the last decision cited above, namely *Karfunkel* v. *Compagnie National Air France*, arose out of this *very same hijacking*. In *Karfunkel*, Judge Inzer Wyatt of the United States District Court for the Southern District of New York dismissed the claims of the two Karfunkel passengers on Air France Flight 139 of June 27, 1976 upon the ground that that court was not a permissible forum for their action against Air France pursuant to Article 28 of the Warsaw Convention. Unlike any of the present petitioners, the plaintiffs in *Karfunkel* were United States citizens, a fact which illustrates that the citizenship of a plaintiff may *not* be a relevant factor in determining the suitability of a particular forum under Article 28.

In holding that all of the *Karfunkel* claims against Air France were subject to the terms of the Warsaw Convention and thus barred by the provisions of Article 28, Judge Wyatt placed primary reliance upon the earlier decision of that court in *Husserl* v. *Swiss Air Transport Co., supra*. *Husserl* arose out of a hijacking in which a Swissair aircraft was diverted to a desert airport in Jordan where the

passengers were forced to stay in the aircraft for approximately twenty-four hours and were then confined to a hotel in Amman, Jordan for another four days. In commenting upon this set of facts, Judge Wyatt in *Karfunkel* observed that *Husserl* involved "a hijacking in all respects indistinguishable from that at bar." 427 F.Supp. at 975. Perforce, then, the facts in *Husserl* are equally "indistinguishable" from the facts of the hijacking involved herein.

Since the Illinois Supreme Court was clearly correct in holding that the Warsaw Convention is applicable to *all* of petitioners' claims against respondent Air France for injuries arising out of the hijacking of June 27, 1976, it is apparent that these claims are exclusively governed by the conditions and limits established by the Warsaw Convention including (49 Stat. Part 2—3020):

> *"Article 24*
>
> (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

POINT II

No authority exists for the interpretation of the word 'domicile' in Article 28 of the Warsaw Convention asserted by petitioners.

Petitioners' primary grounds for seeking review by this Court of the decision of the Illinois Supreme Court, as it relates to the scope of Article 28 of the Warsaw Convention, is their argument that the Illinois Supreme Court

erred in holding that the word "domicile" contained in Article 28 does not mean any country in which the airline carries on business on a "regular and substantial" basis.

Petitioners are unable to cite any authority for such an interpretation of the word "domicile". The reason for this lack of support is that no one has ever had the temerity to suggest such a meaning. The fact that no party, despite the multitude of United States decisions concerning the interpretation of Article 28, has argued for the meaning of "domicile" proposed by the petitioners is ample demonstration of the absurdity of this argument. On those occasions where courts have commented upon the "domicile" provision of Article 28, they have unequivocally stated that a corporation is domiciled at its place of incorporation, a proposition previously considered not worthy of even contesting.

The leading case in the United States concerning the interpretation of Article 28 of the Warsaw Convention is *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971). That action involved a claim for personal injuries sustained by a United States citizen on a flight of Canadian Pacific, an airline incorporated in Canada, between Vancouver, British Columbia and Tokyo, Japan. The plaintiff's contract of carriage had been purchased in Vancouver. The facts of the *Smith* action are therefore comparable to the facts of petitioners' claims against Air France, in that the plaintiff in *Smith* was suing a foreign airline for personal injuries sustained outside of the United States, on a contract of carriage which did not involve the United States as a final destination and which had not been purchased in the United States. As with petitioners herein, the only basis upon which the plaintiff in *Smith* could allege jurisdiction in his action brought in the United States District Court for the Southern District of New York was that Canadian Pacific maintained a ticket office in that jurisdiction and was generally sub-

ject to service of process therein. In *Smith,* the Second Circuit dismissed plaintiff's action for lack of jurisdiction under Article 28 of the Warsaw Convention. In its discussion of the four forums enumerated in Article 28, the Second Circuit held as follows with respect to the meaning of the "domicile" forum (452 F.2d at 802, emphasis supplied):

> "The domicile of Canadian Pacific Airways is in Canada, where it is incorporated, a *fact* not disputed by [plaintiff] appellee."

The Second Circuit then went on to specifically hold, in discussion of a previous decision of that court in *Eck* v. *United Arab Airlines, Inc.,* 360 F.2d 804 (2d Cir. 1966), that the presence of the defendant airline in the jurisdiction generally, without any other United States contacts with the particular contract of carriage, would *not* support jurisdiction under Article 28 (452 F.2d at 803):

> "In *Eck,* the ticket for an international flight was purchased in Oakland, California for a Switzerland-Sudanese Republic trip. Relying on the purchase of the ticket at a site *within* the United States, through an agency of the carrier, *plus* the existence of a regular ticketing and booking office within the United States, this court concluded that Article 28(1) was satisfied. 360 F.2d at 814-815. *Eck* quite clearly did not hold that suit in the United States would be proper where the ticket was purchased outside the United States and no United States contacts, including but not limited to interline or intraline ticketing arrangements, existed beyond the presence of a ticketing and booking office of the carrier-defendant."

Numerous other cases have ruled that an airline's domicile for the purposes of Article 28 is its place of incorporation. *Eck* v. *United Arab Airlines, Inc.,* 360 F.2d 804, 809 (2d Cir. 1966); *Butz* v. *British Airways,* 421 F.Supp. 127,

131 (E.D.Pa. 1976), *aff'd mem.,* 566 F.2d 1168 (3d Cir. 1977); *Karfunkel* v. *Compagnie Nationale Air France,* 427 F.Supp. 971, 974 (S.D.N.Y. 1977) (in which the attorneys who are co-counsel to petitioners herein, in an action arising out of the same hijacking, conceded that the domicile of Air France is its place of incorporation); *Vergara* v. *Aeroflot "Soviet Airlines",* 390 F.Supp. 1266, 1269 (D. Neb. 1975); *Kahn* v. *Compagnie Nationale Air France,* 9 Avi. 17, 107 (S.D.N.Y. 1964); *Nudo* v. *Societe Anonyme Belge d'Exploitation, Etc.,* 207 F. Supp. 191, 192 (E.D. Pa. 1962); *Galli* v. *Re-Al Brazilian Int. Airlines,* 29 Misc.2d 499, 500, 211 N.Y.S.2d 208, 209 (Sup. Ct., Queens Co. 1961).

Petitioners' asserted interpretation of "domicile" would render meaningless Article 28 of the Warsaw Convention by reducing the question of jurisdiction under the Convention to a strictly local matter of *in personam* jurisdiction. It would mean that the United States Court of Appeals for the Second Circuit in *Smith* v. *Canadian Pacific Airways, Ltd., supra,* and numerous other courts, had wasted their judicial time by considering Article 28 since they could have merely accepted jurisdiction in those cases based on consideration of *in personam* requirements. The Illinois Supreme Court clearly recognized the incompatibility of petitioners' interpretation of the "domicile" forum with the jurisdictional scheme of Article 28 of the Warsaw Convention when that court observed that "plaintiffs' request to adopt this basis of jurisdiction is in effect a request to create a new jurisdictional standard for the Convention." 74 Ill. 2d 90, 383 N.E.2d at 981.

Petitioners, unable to find any United States authority for their proposed interpretation of the "domicile" forum contained in Article 28, make reference to the fact that in certain foreign jurisdictions and treatises, the word "domicile" employed in the official French text of Article 28 has been interpreted as "ordinarily resident". However, the petitioners have cited this difference in translation in a

vacuum, and have come forth with *no authority* to indicate that "ordinarily resident" would be given any different interpretation by United States courts than "domicile" has been. In fact, examination of the law of the United Kingdom, wherein "domicile" in Article 28 has been translated to mean "ordinarily resident", reveals that this translation only serves to support the interpretation of the word "domicile" that has been announced by United States courts. The leading English treatise on air law, and indeed one of the leading treatises in the world on this subject, is Shawcross and Beaumont, *Air Law.*

In their Fourth Edition (1977), Shawcross and Beaumont succinctly explain the meaning of "ordinarily resident" in the following manner:

> "I. WHERE THE CARRIER IS ORDINARILY RESIDENT.
>
> 439. One of the four bases of jurisdiction applicable to actions for damages under the Act is that the court has jurisdiction 'where the carrier is ordinarily resident.' The notion of ordinary residence is more often used in relation to individuals; but the carrier will generally be a corporation, for which the notion is inappropriate. In tax cases, it has been held that a company is resident 'where the central management and control actually abides;' that a company can be resident in two or more countries, provided that central management and control is divided between those countries. It seems likely that the English courts would adopt a similar approach in the present context, so that in almost every case the question will be where does the board of directors have its seat."

Shawcross and Beaumont, *Air Law,* Fourth Ed., 1977, Vol. 1 at 413. It is beyond dispute that respondent Air France is a French corporation, primarily owned by the French

government, with its headquarters in Paris. The "central management and control" of Air France undeniably abides in France. Examination of the law of a jurisdiction which has interpreted "domicile" to mean "ordinarily resident", therefore, serves to underscore the complete lack of authority for the interpretation of the word "domicile" in Article 28 expounded by petitioners.

As a final attempt to submit some "authority" to this Court for the interpretation of "domicile" that they propose, petitioners have resorted to "authority" of their own making, namely an affidavit from a "French expert" to the effect that the phrase "du domicile du transporteur" contained in the official French text of Article 28 can be interpreted to mean any place where the carrier carries on business on a regular and substantial basis.

While the "bootstrap" nature of petitioners' affidavit is obvious, respondent Air France will additionally point out that whatever credibility petitioners' affidavit might have is totally destroyed by the fact that the "domicile" forum in Article 28 has specifically been the subject of interpretation by the French courts. Set forth as "Appendix B" to this brief is a certified translation of a decision of the Tribunal de Grande Instance de Paris, dated April 28, 1978, in an action entitled *Zimonyl* v. *Varig.* That action, which arose out of the crash of a Varig Airline Boeing 707 near Paris on July 11, 1973, involved a claim for the wrongful death of a passenger who was travelling on that flight pursuant to a contract of carriage issued in Budapest, Hungary calling for transportation from Budapest to Rio de Janeiro, Brazil, and return. Plaintiff, while conceding Varig's principal place of business was in Brazil, attempted to argue that the "domicile" of Varig, for the purposes of Article 28, could be regarded as Paris, since the airline had a ticket office there. The Paris court specifically rejected plaintiff's contention, holding that a corporation can have only one

domicile, which in the case of Varig was in Brazil where it was incorporated and had its principal place of business. It is apparent, therefore, that "du domicile du transporteur" has been given the same meaning by the French courts as "domicile of the carrier" in the United States decisions.

Accordingly, *no authority* exists for the interpretation of the word "domicile" propounded by petitioners. To the contrary, authority in the United States and abroad is unanimous to the effect that the "domicile" of an air carrier is its place of incorporation, and does *not* constitute any place where the carrier carries on business on a regular and substantial basis.

POINT III

The provisions of Article 28 of the Warsaw Convention clearly relate to subject matter jurisdiction.

Just as baseless and unfounded as petitioners' "domicile" argument is their argument that respondent Air France somehow waived the provisions of Article 28 of the Warsaw Convention by not filing a special appearance in the action instituted in the Circuit Court of Cook County, Illinois.

The circumstances under which a party must enter a special appearance in an action in Illinois are specifically set forth in the *Illinois Civil Practice Act*, Ill. Rev. Stat., Ch. 110, § 20(1) (1975) (emphasis supplied):

> "§ 20. Special Appearance. (1) Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court *over the person of the defendant.* A special appearance may be made as to an entire proceeding or as to any cause of action involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance."

The essential problem with petitioners' argument relating to the manner in which respondent Air France originally appeared in this action is that it does not involve an issue which is subject to the jurisdiction of this Court. There has been no provision for a special appearance in the Federal Rules of Civil Procedure since 1938. 15 Wright & Miller, *Federal Practice and Procedure,* § 3829, at 196 (1976). Accordingly, the manner by which the Illinois courts interpret the provisions of Article 28 with respect to the somewhat unique pleading practices of that state can hardly constitute a federal question subject to review by this Court under 28 U.S.C. § 1257(3).

At any rate, as was aptly observed by the Illinois Supreme Court in its decision, petitioners have made their argument relating to the nature of Article 28 of the Warsaw Convention "without citation of any supporting decision". 74 Ill. 2d 90, 383 N.E. 2d at 983.

The leading case involving the interpretation of Article 28 of the Warsaw Convention is *Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798 (2d Cir. 1971), already discussed at length in this brief. In reversing the district court's denial of defendant's motion to dismiss the complaint for lack of subject matter jurisdiction, the Second Circuit held (452 F.2d at 801):

> "We agree, however, that Article 28(1) '. . . must be considered as absolute and mandatory, on the national level, in the jurisdictional sense, and be given [its] proper status as a treaty obligation of our nation without equivocation.' The Warsaw Convention, by virtue of its status as a treaty made under the authority of the United States, is the supreme law of the land, equal in stature and force to domestic laws of the United States. U.S. Const. art. VI. . . ."

Having held that the provisions of Article 28(1) relate to jurisdiction, the Second Circuit in *Smith* went on to explain the manner by which courts must apply Article 28 to the facts of a particular action (452 F.2d at 802):

> "We therefore look to the Convention to determine its applicability here. Only if it does apply so as to permit of treaty jurisdiction need we answer domestic jurisdiction and venue questions. If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. § 1331(a), which permits cases *arising under* United States treaties, clearly cannot be established. Similarly, if the Convention precludes suit, our inquiry ceases without an examination of diversity jurisdiction under 28 U.S.C. § 1332(a)(2); in other words, treaty provisions, being of equal constitutional status, may operate under article VI of the Federal Constitution as limitations on diversity jurisdiction, just as the requirements of jurisdictional amount may so operate."

It is therefore apparent that the Second Circuit in *Smith* referred to Article 28 as "treaty jurisdiction" merely to differentiate the Article 28 limitations from the other limitations on the *subject matter jurisdiction* of Federal Courts that are based on Article III of the United States Constitution and the jurisdictional provisions of the United States Code.

In numerous decisions since *Smith,* courts have granted motions to dismiss for lack of *subject matter* jurisdiction because of the operation of Article 28. *McCarthy* v. *East African Airways Corp.,* 13 Avi. 17,385 (S.D.N.Y. 1974), *aff'd mem.,* 517 F.2d 1395 (2d Cir. 1975); *Butz* v. *British Airways,* 421 F.Supp. 127 (E.D. Pa. 1976), *aff'd mem.,* 566 F.2d 1168 (3d Cir. 1977); *Karfunkel* v. *Compagnie Nationale Air France,* 427 F.Supp. 971 (S.D.N.Y. 1977); *Rinck* v. *Deutsche Lufthansa,* 57 App. Div. 2d 370, 395 N.Y.S.2d 7 (1st Dep't 1977), *aff'd,* 44 N.Y. 2d 714 (1978);

Varkonyi v. *Impressa de Viacao Airea Rio Grandense (Varig),* 71 Misc.2d 607, 336 N.Y.S.2d 193 (Sup. Ct., N. Y. Co. 1972).

Therefore, no basis exists for petitioners' interpretation of the "treaty jurisdiction" term employed by the Second Circuit in *Smith.* However, petitioners do more than argue that "treaty jurisdiction" does not constitute subject matter jurisdiction. They assert, as they must in view of the specific language of Section 20(1) of the Illinois Civil Practice Act, that the provisions of Article 28 can be equated with jurisdiction *over the person.* Such argument absolutely flies in the face of the specific holding of the Second Circuit in *Smith.* That decision, in its discussion of the jurisdictional nature of Article 28 of the Warsaw Convention, declares unequivocally that the concept of "treaty jurisdiction" employed by that court with respect to Article 28 has *absolutely no relation* to the domestic law notion of jurisdiction *over the person* (452 F.2d at 800, n. 4):

> "No question of *in personam* jurisdiction was raised in this case, although such jurisdiction is also an important element of the power of a court to decide a case."

Similarly, in *Benjamins* v. *British European Airways,* 572 F.2d 913 (2d Cir. 1978), *cert. denied,* —— U.S. —— (1979), a wrongful death action arising out of the crash of a British Airways aircraft in England, the Second Circuit made a parallel observation in discussing the application of the provisions of Article 28 to the facts of that action (572 F.2d at 915, n. 4):

> "Personal jurisdiction is not an issue in this case, as each defendant has submitted to the *in personam* jurisdiction of the court."

No clearer indication of the fallacy of petitioners' argument relating to the nature of Article 28 exists than the

above two quotes from the Second Circuit's *Smith* and *Benjamins* decisions. Petitioners have based their argument that the provisions of Article 28 of the Warsaw Convention do not relate to subject matter jurisdiction *primarily* upon the "treaty jurisdiction" language employed by the Second Circuit in *Smith*. At the same time, petitioners *completely ignore Smith* when they argue that the provisions of Article 28 of the Warsaw Convention can be equated with the domestic notion of jurisdiction *over the person*.

POINT IV

The provisions of the Warsaw Convention are clearly constitutional and, in any case, the issue of the constitutionality of the Warsaw Convention was not properly raised before the Illinois Supreme Court.

Petitioners accuse the Illniois Supreme Court of "gross misrepresentation" of the record which they assert "is tantamount to an unconstitutional denial of due process and equal protection to the plaintiffs." It should be pointed out that petitioners never moved in the Illinois Supreme Court for a rehearing, in order to refer that court to its alleged misrepresentation of facts in the record. Such a petition is a pre-requisite to accusing the highest court of the State of Illinois of "gross misrepresentation."

Petitioners also include in their brief to this Court an extended discussion of the alleged unconstitutionality of the Warsaw Convention. Such discussion, however, was *not included* in their brief to the Illinois Supreme Court, and the constitutionality of the Warsaw Convention was not among the questions certified for review by the Illinois Supreme Court from the decision of the Circuit Court of Cook County, Illinois. While the decision of the Illinois Supreme Court briefly discusses the allegation of unconstitutionality of the Warsaw Convention, giving this allegation the short shrift that it deserves, it is apparent that the Illinois Supreme Court was of the opinion that petitioners had "waived their point as to unconstitutionality in this court under our Rule 341(e)(7) (58 Ill. 2d, R.341(e)(7))". 74 Ill. 2d 90, 383 N.E.2d at 984. It is therefore submitted that petitioners have failed to properly preserve this issue for review by this Court.

In any case, as the Illinois Supreme Court aptly observed, the petitioners are unable to cite "any decision holding the Convention invalid, either with respect to Article 28(1) or otherwise". 74 Ill. 2d 90, 383 N.E.2d at 984. To the contrary, this Court, in *Duke Power Co.* v. *Carolina Env. Study Gp.*, 57 L.Ed.2d 595 (1978), recently commented that statutes and treaties such as the Warsaw Convention, specifically as they relate to limitations on liability, have "consistently been enforced by the courts". 57 L.Ed.2d at 620-621, n. 32. On many other occasions the Warsaw Convention has been held to be constitutional. *Reed* v. *Wiser*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1978); *McCarthy* v. *East African Airways Corp.*, 13 Avi. 17,385 (S.D.N.Y. 1974), *aff'd mem.*, 517 F.2d 1395 (2d Cir. 1975); *Garcia* v. *Pan American Airways*, 183 Misc. 258, 50 N.Y.S.2d 250, *aff'd*, 269 App. Div. 287, 55 N.Y.S.2d 317, *aff'd*, 295 N.Y. 852, *cert. denied*, 329 U.S. 741 (1946); *Kelley* v. *Sabena*, 242 F.Supp. 129 (E.D.N.Y. 1965); *Pierre* v. *Eastern Airlines, Inc.*, 152 F.Supp. 486 (D.N.J. 1957); *Indemnity Insurance Company of North America* v. *Pan American Airways*, 58 F.Supp. 338 (S.D.N.Y. 1944).

In fact, no appellate court, state or federal, has ever held the Warsaw Convention to be unconstitutional. Nor has this Court ever held *any* treaty of the United States invalid on constitutional grounds.

A constitutional challenge to the provisions of Article 28(1) was clearly rejected in a decision squarely on point with petitioners' claim against Air France herein. *Mc-*

Carthy v. *East African Airways Corp.*, 13 Avi. 17,385 (S.D.N.Y. 1974), *aff'd mem.*, 517 F.2d 1395 (2d Cir. 1975). That decision emanated from the very sort of motion that was granted by the Supreme Court of Illinois—a motion to dismiss for lack of subject matter jurisdiction pursuant to Article 28 of the Warsaw Convention. The court in *McCarthy* granted the airline's motion to dismiss, and in its decision the court rejected the same constitutional argument relating to Article 28 that the petitioners are presenting to this Court (13 Avi. at 17,386):

> ". . . [P]laintiffs' argument that Article 28(1) of the Convention unconstitutionally deprives them of the right to litigate in the Federal Courts must fail. The jurisdiction of the Federal Courts extends only as far as Congress permits, which in some cases is less than the limit of the federal jurisdictional power as set forth in Article III of the Federal Constitution. *Sheldon* v. *Sill*, 49 U.S. 441 (1850); *Jaconski* v. *Advisun Corp.*, 359 F.2d 931 (3d Cir. 1966); *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). As a treaty provision having the force and effect of the domestic laws of the United States, Article 28(1) of the Warsaw Convention may and does constitutionally restrict the subject matter jurisdiction of this Court."

POINT V

As to the applicability of the doctrine of *forum non conveniens* to this lawsuit.

Air France moved to dismiss this action upon the ground that the Circuit Court of Cook County, Illinois lacked jurisdiction of the action by virtue of Article 28 of the Warsaw Convention, and upon the further ground that the suit should be dismissed under the doctrine of *forum non conveniens*. Singapore moved to dismiss the action upon the latter ground only.

The Supreme Court of Illinois granted defendants' motions and directed that the order of the Circuit Court of Cook County, Illinois denying the motion of Air France and of Singapore to dismiss the action be vacated and the court remanded the case to the Circuit Court of Cook County with directions to dismiss the action as to Air France and Singapore. It is obvious that the Supreme Court of Illinois, in dismissing the lawsuit against Air France upon the ground that the suit was barred as to it by the Warsaw Convention, felt it unnecessary to pass upon Air France's alternative motion to dismiss upon the ground of *forum non conveniens*. In fact the court made that very clear (74 Ill. 2d 90, 383 N.E.2d at 984):

> "For the reasons given, we hold that the trial court was in error in denying the motion by Air France to dismiss it from the suit on the ground that suit was barred by the Warsaw Convention.
>
> While the foregoing discussion disposes of the appeal by Air France, there remains to be considered the appeal by Singapore, which, since the complaint did not allege any injury to its own passengers, so as to make the Warsaw Convention applicable, based its motion solely on the ground that the doctrine of *forum non conveniens* required dismissal of the case.
>
> Our holding that the plaintiffs' suit against Air France could not be brought in Cook County because of the Warsaw Convention would seem to diminish, if not eliminate, the suitability of Cook County as a forum for the plaintiffs. The dismissal of Air France from the suit removes the base of the plaintiffs' desire to retain Singapore in the circuit court of Cook County."

The court thereafter reviewed the Illinois law with respect to *forum non conveniens* and dismissed the lawsuit upon that ground as to Singapore. It is obvious from the opinion of the court that, had it not dismissed the ac-

tion against Air France on the basis that the suit against it was barred by the Warsaw Convention, it would have dismissed the action against Air France upon the ground of *forum non conveniens.*

While the Illinois Supreme Court's discussion of the doctrine of *forum non conveniens* does not directly constitute its grounds for dismissal of petitioners' claims against Air France, said respondent feels constrained to comment upon several of the points raised by petitioners in their brief with respect to this issue.

First, petitioners appear to claim that the Illinois Supreme Court's alleged failure to apply the *forum non conveniens* principles announced in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), violated their constitutional rights. Petitioners are unable, however, to cite even *one case* which decided the *forum non conveniens* doctrine on a constitutional basis. *Gilbert* was not based on constitutional considerations, but on the inherent discretion of federal courts of law and equity to decline to exercise jurisdiction even where they otherwise may have jurisdiction over the parties and subject matter; and where the venue of the action may otherwise be proper. Petitioners attempt to raise the standards set forth in *Gilbert* to federal constitutional dimensions. No court has ever done so. The doctrine of *forum non conveniens* is a doctrine based on equitable principles within the discretion of *each court system.* As such, the application of the doctrine by the Supreme Court of Illinois is a matter of state law and is not subject to review by the United States Supreme Court under 28 U.S.C. § 1257(3).

Second, petitioners' entire argument concerning *forum non conveniens* is grounded upon the allegation that no jurisdictional barriers exist to suit against the three named defendant airlines in the Circuit Court of Cook County, Illinois. However, discussion of the issue of *forum non conveniens* in the decision of the Illinois Supreme Court

does not even commence until after that court's dismissal of the claims brought against Air France for lack of jurisdiction under Article 28 of the Warsaw Convention. Since, as has been demonstrated in this brief, the Illinois Supreme Court was clearly correct in holding that Article 28 precluded suit by petitioners against Air France in the Circuit Court of Cook County, Illinois, it is submitted that petitioners' entire discussion of the issue of *forum non conveniens* is based upon a false premise and is entirely irrelevant.

Third, petitioners' allegation regarding the amenability to suit of the three defendant airlines in the Circuit Court of Cook County, Illinois, also conveniently ignores the fact that the third defendant airline, Gulf Air Lines, Inc., has filed a motion to dismiss petitioners' actions against it for lack of jurisdiction over the person. While petitioners mention in their brief (p. 14) that decision on that motion has been stayed pending the outcome of this petition for a writ of certiorari, petitioners' brief is written as though Gulf Air's motion had already been denied.

Finally, and most importantly, respondent Air France must emphasize once again that petitioners have completely failed to mention in their brief that timely actions have been filed against Air France in either Israel, France or Canada on behalf of *all* the passengers of the hijacked Air France aircraft who were named in the action brought in the Circuit Court of Cook County, Illinois. A complete list of the passengers whose claims have been brought against Air France in the courts of Israel, France and Canada accompanies this brief as "Appendix A".

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

APPENDIX A

The following is a list of plaintiffs whose cases were dismissed by order of the Supreme Court of Illinois and who instituted actions against Air France in Canada, France or Israel shortly before the prescriptive period expired under Article 29 of the Warsaw Convention.

MONTREAL, CANADA:

Salomon Weizman
Anna Morina (Ninette Anna Benaroche)

PARIS, FRANCE:

Sylver Ayache
Maurice Benshimon (Maurice Bensimon)
Sofie Zaoui Chamak (Sophie Chamak)
Jean-Marc Dahan
Miriam Field (Myriam Field)
Mendel Liebesman (Mendel Liebesmann)
Jocelyn Mounnier (Jocelyne Monnier Lanners)
Georgette Poúlain (Georgette Poulain Bettleheim)
Solomon Rubin (Charles Salomon Rubin)
Regine Rubin
Dov Shlaen (Dov Boris Shlaen)
Elie Silvera (Claude Silvera)
Gilbert Weill
Héléne Weill (Héléne Rosenblum Weill)
Oliver Cojot (Olivier Cojot)
Palu H. Baries, as administrator of the estate of Ida Borukchovitch (Paul Baris, as administrator for the estate of Ida Boruchovitch)

TEL AVIV, ISRAEL:

Eitan Aronowitch
Miram Aronowitch
Estate of Dora Block
Arieh Brodsky
Yael Brodsky
Anat Brodsky
Dana Brodsky
Estate of Pasco Cohen
Hannah Cohen
Yaakov Cohen
Tzipporah Cohen
Michael Cojot
Nahoum Dahan
Ichak David
Hadasza Agnes David
Uzi Davidson
Sara Davidson
Ron Davidson
Benjamin Davidson
Yehuda Gottlieb (Gotlieb)
Regina Gottlieb (Gotlieb)
Baruch Gross
Ruth Gross
Shy Gross
Ilan Hartuv
Itzchak Hirsh
Lili Hirsch
Akiva Laxer (Avida Laxer)
Joseph Aboujdid
Ezra Almog
Janet Almog
David Benitah
Odette Benitah
Yoram Benitah
Esther Dahan

Alkeslassy Heftsibah (Eskelassy)
Arno Hilf
Nadia Israel
Zeev Josepovici (Iosipovic)
Hara Josepovici (Iosipovic)
Monique Khalepski-Epstein (Kaplansky-Epstein)
Jerachmiel Kiper (Kipper)
Rina Kiper (Kipper)
Lifsa Lazarovici (Lazarovicz)
Ada Lazarovici (Lazarovicz)
Chana Lenczner
Michael Livni
Michael Rabinovitz
Rivka Rabinovitz
Renata Reisfeld
Abraham Rubinstein
Gavriela Rubinstein
Michal Warshavsky
Elie Roger Zeitan
Aimee Aouva Zeitan (Zerbit)
Hana Zriehn (Zeritan)
Claude Rosenkovitch
Emma Rosenkovitch
Noam Rosenkovitch
Ella Rosenkovitch
Patricia Martell
Estate of Jean-Jacques Mimouni

APPENDIX B

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STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK

CERTIFICATION

This is to certify that the attached translation No. 26734 is, to the best of my knowledge and belief, a true and accurate rendition into English of a Judgment rendered in the matter of Zimonyl vs. Varig Company, written in French.

New York, New York, the 22nd day of June 1978.

BERLITZ TRANSLATION SERVICE
EBH
Eileen B. Hennessy

Subscribed and sworn to before me
on this the 22nd day of June 1978.

Notary

(Seal)

ALBERT J. LAMOTHE, JR.
Notary Public, State of New York
No. 30-7410630
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1980

COURT OF FIRST INSTANCE OF PARIS

First Division
Section Two

HEARING OF: April 28, 1978
IN THE MATTER OF: Zimonyl, widow of Hegedus
AGAINST: Varig Co.
SUBJECT: Lack of Jurisdiction.

No. 17.345/77
ASS/8-11-75
Lack of Jurisdiction

JUDGMENT RENDERED ON APRIL 28, 1978,
BY THE COURT OF FIRST INSTANCE OF PARIS

FIRST DIVISION—SECOND TWO

PLAINTIFF:

Mrs. Emese Zimonyl, widow of Mr. Bela Hegedus, residing at Tusnadi u. 25, Budapest, Hungary,

represented by:
Joseph Caporal, Attorney at Law

DEFENDANT:

VARIG Airlines (EMPRESA DE AEREA RIO GRANDESE), with headquarters at 365 Avenue Almirante Sylvio de Noroanha, Rio de Janeiro, Brazil, and with its general agency for France at 27 Avenue des Champs Elysées, Paris 8,

represented by:
André Garnault, Attorney at Law

THE PUBLIC PROSECUTOR

Mr. Boittiaux, Deputy

MEMBERS OF THE COURT

Magistrates sitting:

Mr. Metayer, Presiding Judge
Miss Cochard, First Judge
Mrs. Tarabeux, Judge

SECRETARY-CLERK OF THE DIVISION:
Mr. Michaud.

PLEADINGS: At the public hearing of March 17, 1978.

JUDGMENT: Pronounced in public session after hearing both parties—subject to objection

x

x x

1) FACTS AND PROCEEDINGS

On July 11, 1975, Mrs. Emese Zimonyl, widow, served a summons upon the Brazilian company EMPRESA DE VIACAO AEREA RIO GRANDESE (logo VARIG), for interim payment of the sum of 4,200,000 Francs, representing damages occasioned by the death of her husband, Bela Hegedus, in the air crash of July 11, 1973, near Saulx-les-Chartreux (Essonne).

By Court document of June 16, the VARIG Company, based on the provisions of Article 28 of the Warsaw Convention, alleged:

1) Territorial non-jurisdiction of the Court of the First Instance of Paris as against the Federal Court of Rio de Janeiro;

2) Plea of suit pending elsewhere, the plaintiff having also brought an action for the same claims before the Court of First Instance of Corbeil.

In her pleadings of March 2, 1977, Mrs. Hegedus maintained that the Court of Paris did have jurisdiction, as the VARIG Company has a domicile at 27 Avenue des Champs Elysées, Paris, where the summons was served upon it.

She further alleged that the existence of a rule of *lis alibi pendens* between French and foreign courts was at the very least questionable; and declared that she had no objection to postponement of a decision on her application for relief until a decision was made on the actions pending before foreign courts and contesting the *lis pendens* in France, the summons before the Court of Corbeil not having been returned.

In its answer, dated March 7, 1978, the Varig Company declared that Article 28 of the Warsaw Convention did not place an agency on the same footing as the domicile of the carrier, and that a mere decentralized office, such as that of Paris, determined a special jurisdiction only if it had issued the transportation contract concerned, which is not the case here as regards Varig's agency in Paris;

Wherefore it was pleading lack of jurisdiction.

II—ARGUMENT

Whereas Article 28 of the Warsaw Convention, applicable in France, provides that an action for liability must be brought before one of four courts, restrictively listed, at the choice of the plaintiff:

—That of the carrier's domicile;

—That of the principal headquarters for its operation;

—That of the place where it has an office which entered into the contract;

—That of the place of destination.

Whereas the plaintiff maintains that the Varig Company has a domicile in Paris at its agency at 27 Avenue des Champs-Elysées; whereas this domicile is of necessity separate from the principal headquarters of its operation, since it is mentioned separately in the list of the places of possible jurisdiction;

Whereas Mr. Hegedus's ticket was written in Budapest by the Malev Company for a trip from Budapest and return by way of Rio de Janeiro and Paris;

Whereas the principal headquarters of the defendant is at Rio de Janeiro, and Paris is only one of its agencies and is not the agency that made the contract;

Whereas, in contrast to Mrs. Hegedus's allegation, Paris cannot be the carrier's domicile, as a person, whether physical or legal, can have only one domicile, which in this case is Rio de Janeiro, the headquarters of the Varig Company;

Whereas Article 28 hereinabove cited uses the word "domicile" in the singular, and does not take into consideration the location of the establishment or agency unless the contract was made there;

Whereas Mrs. Hegedus's interpretation of the idea of domicile actually refers to the so-called jurisprudence of "principal stations," which is an essentially domestic attack on the principle of uniqueness of domicile and cannot be internationally applied without a specific text; wherefore Article 28 § 1 of the Warsaw Convention cannot be subjected to an incorrect extension that it does not have;

Whereas in this case the domicile of the Varig Company is the same as the principal headquarters of its operation, and is its corporate headquarters; whereas it is located at Rio de Janeiro, which fact excludes any competence of the Court of First Instance of Paris to be seized of Mrs. Hegedus's action for liability;

Whereas in these conditions the objection of lack of jurisdiction raised by the Varig Company should be admitted, and in accordance with Article 96 § 1 of the New Code of Civil Procedure competence should be disclaimed;

WHEREFORE

the Court, in public session, rendering judgment after hearing both parties and subject to objection,

Disclaims competence,

Dismisses both parties,

Orders Mrs. Hegedus to pay the expenses that may be paid directly by André Garnault, the attorney retained, provided he paid same out of his own pocket without advance therefor.

So made and adjudged in Paris on April twenty-eighty, one thousand nine hundred seventy-eight.

The Secretary-Clerk The Presiding Judge

Drawn up by: Mr. Metayer